



POLICE DEPARTMENT

-----X
In the Matter of the Disciplinary Proceedings :

- against - :

Police Officer Keith Sawyer :

Tax Registry No. 916647 :

Military & Extended Leave Desk :

FINAL


ORDER

OF

DISMISSAL
-----X

Police Officer Keith Sawyer, Tax Registry No. 916647, Shield No. 30608, Social Security No. ending in [REDACTED] having been served with written notice, has been tried on written Charges and Specifications numbered 2014-11720, as set forth on form P.D. 468-121, dated November 6, 2014, and after a review of the entire record, has been found Guilty as Charged.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Police Officer Keith Sawyer from the Police Service of the City of New York.


WILLIAM J. BRATTON
POLICE COMMISSIONER

EFFECTIVE:



POLICE DEPARTMENT

March 25, 2015

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In the Matter of the Charges and Specifications : Case No.
- against - : 2014-11720
Police Officer Keith Sawyer :
Tax Registry No. 916647 :
Military & Extended Leave Desk :
-----X

At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable Rosemarie Maldonado
Deputy Commissioner Trials

APPEARANCE:

For the Department:

Scott Rosenberg, Esq.
Department Advocate's Office
One Police Plaza
New York, New York 10038

For the Respondent:

Roger S. Blank, Esq.
373 Park Avenue South, 6th floor
New York, NY 10016

To:

HONORABLE WILLIAM J. BRATTON
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

The above-named member of the Department appeared before me on November 6, November 18, and December 2, 2014; January 12, January 20, and January 23, 2015, charged with the following:

1. Said Police Officer Keith Sawyer, on or about and between January 10, 2014, and April 14, 2014, did engage in conduct prejudicial to the order, efficiency or discipline of the Department in that said Police Officer Sawyer wrongfully did ingest marijuana without police necessity or authority to do so. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 GENERAL REGULATIONS

2. Said Police Officer Keith Sawyer, on or about and between January 10, 2014, and April 14, 2014, did engage in conduct prejudicial to the order, efficiency or discipline of the Department in that said Police Officer Sawyer wrongfully did possess marijuana without police necessity or authority to do so. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS

The Department was represented by Scott Rosenberg, Esq., Department Advocate's Office. Respondent was represented by Roger S. Blank, Esq. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

After evaluating the testimony and evidence presented at the hearing, this tribunal finds Respondent guilty of the subject charges.

Background

The following facts are undisputed. Respondent was screened for drugs on January 10, 2014. The laboratory analysis came back with negative results. On April 14, he was randomly selected to undergo drug screening again. Police Officer Edmund Morrissey at the Medical Division collected three hair samples from Respondent's pubic region, and sent two of them to Psychomedics Corporation

(Psychemedics), a drug testing laboratory in Culver City, California. As per Department policy, the third sample was stored at the Medical Division so that, in the event that the first two samples tested positive, Respondent could send the third sample to a lab of his choosing for independent testing. Psychemedics notified the Department that Respondent's hair samples tested positive for marijuana. On or about May 20, 2014, Respondent sent his third hair sample to Quest Diagnostics (Quest). This third sample also came back positive for marijuana. All three of Respondent's hair samples tested positive for the marijuana metabolite at a concentration of more than 25 times the administrative cutoff level.

Respondent, a 19-and-a-half-year member of the Department, denied ever ingesting marijuana. The day after being suspended from duty, he went to his doctor's office and provided a urine sample. Over the course of the next four months, he also underwent two different hair tests, a fingernail test, and a toenail test. The urine sample and all subsequent samples submitted by Respondent came back with negative results. Respondent argued that because the January 10 test and all tests taken subsequent to April 14 had negative results, the positive results for the hair samples collected on April 14 could not be trusted as accurate.

Drug Tests

Below is a summary of the evidence pertaining to each of the multiple drug test results submitted to this tribunal for review.

a. The April 14 NYPD Hair Sample Collection

Morrissey is a certified paramedic and has received training on collecting hair samples. He worked in the Drug Screening Unit from February 2013 until July 2014. On

April 14, 2014, Respondent signed in at the Medical Division and signed a Drug Screening Questionnaire, on which he indicated that he had not taken any prescription medication in the last three months. (Tr. 20-21, 24-27; Dep. Exs. 1, 2)

According to Morrissey, once inside the collecting room, he washed the table with alcohol and then covered it with a fresh sheet of paper. He then gave Respondent a razor. Morrissey stood directly behind Respondent as Respondent stood over the table and shaved pubic hair onto the paper. Morrissey explained that hair is taken from the pubic region when the donor does not have sufficient hair on the rest of his body. (Tr. 31-32, 49)

In Respondent's presence and with gloved hands, Morrissey separated Respondent's hair into three samples and placed each sample into its own hair collection kit. The kits, which included an interior paper envelope and exterior plastic pouch, were both initialed by Respondent and sealed with security tape. In each kit, Morrissey placed a custody and control form, on which Respondent was identified by donor identification number 21-1565-14-XH. Respondent signed these custody and control forms to certify that the samples were his. (Tr. 26, 34-35; Dep. Ex. 3) Morrissey placed Respondent's samples in a locked box to which only people who worked in the unit had access. The next day, two of Respondent's samples were sent to Psychedics for testing via Federal Express. (Tr. 36-37, 45; Dep. Exs. 4 through 7) Morrissey conducted nine sample collections that day. He explained that though he did not have a specific recollection of collecting from Respondent, his practice was to follow standard collection procedure. (Tr. 65-66, 68-69)

In contrast to Morrissey's testimony, Respondent claimed that he used a scissor, not a razor, to cut his pubic hair. He did not recall Morrissey wiping down the table or covering it with paper. According to Respondent, after he cut the hair, Morrissey picked up the samples and moved them to the front of the room. Respondent testified that he did not see Morrissey seal the samples. (Tr. 370-372)

b. The Psychomedics Results of NYPD Hair Samples

Thomas Cairns is the senior scientific advisor and deputy lab director at Psychomedics. This is a salaried position. Psychomedics has been certified by the Food and Drug Administration (FDA) for its testing methods for marijuana, and is licensed by the New York State Department of Health in forensic toxicology with a particular emphasis on workplace drug testing. Based on the qualifications cited in his curriculum vitae, Cairns was deemed an expert in the field of forensic toxicology, specifically as it applies to workplace drug testing. (Tr. 81, 88; Dep. Ex. 8)

Cairns explained that marijuana is a mixture of cannabinoid compounds, which, when ingested into the body, enters the bloodstream. When passed through the liver, enzymes convert the marijuana into the metabolite carboxy tetrahydrocannabinol (THC). This metabolite is only found in the body after ingestion of marijuana, and it circulates throughout the body. As THC-contaminated blood enters the base of a strand of hair, the metabolite becomes trapped inside the hair structure. Since hair grows at a predictable rate, it acts as a "tape recorder" of drug ingestion. A sample of pubic hair has a look back period of 12 to 18 months. (Tr. 90-92, 150)

The first test that Psychomedics conducts on a sample is enzyme immunoassay (EIA). If this analysis finds a presence of cannabinoids at a concentration at or above the

administrative cutoff level of 10 picograms per 10 milligrams of hair (10pg/10mg), it is considered presumptive positive. Cairns explained that the administrative cutoff level is used to clearly differentiate a drug user from someone who has been subjected to passive marijuana exposure. In presumptive positive cases, another portion of the same sample is aggressively washed to remove external contamination and sent for gas chromatography mass spectrometry (GC/MS). If GC/MS analysis finds a presence of THC above the cutoff level of 1pg/10mg, the lab will test a second sample for confirmation. Only in cases where both the first and second samples test positive does Psychemedics report a positive finding to the Department. (Tr. 95, 98-99, 100-102, 104-105)

At trial, Cairns reviewed the laboratory data package produced by Psychemedics for the samples collected from Respondent on April 14. The package, in which Respondent was identified by his donor identification number, showed that the chain of custody remained intact. Respondent's first sample came back from GC/MS analysis with a result of 28.7pg/10mg. According to Cairns, this concentration of THC 28 times the administrative cutoff -- signified multiple ingestions of marijuana during the look back period. Respondent's second sample came back with a result of 26pg/10mg, which Cairns called statistically identical to the first. (Tr. 108, 111-112, 116; Dep. Ex. 9)

Cairns noted two errors in the data package. First, the results page for Respondent's first sample at one point had to be updated because it was not noted in its original version that the sample had been collected from the pubic region. (Tr. 112-113; Dep. Ex. 9 p. 4) The second error involved what Cairns calls his executive summary. Several months after issuing his report to the Department, Cairns had to replace the executive summary page because he had mistakenly transcribed the result for

Respondent's second sample as being 3.7pg/10mg instead of the 26pg noted in the package's test results. (Tr. 118-119; Dep. Ex. 9 p. 3) According to Cairns, the executive summary is not part of the scientific record, and all other parts of the data package were accurate and precise. (Tr. 120-121)

Psychemedics receives approximately 3,000 hair samples a day. According to Cairns, errors may occur on occasion, but errors are caught and corrected before they can impact a final determination of whether a sample is positive or negative. Cairns did acknowledge, however, that some Psychemedics lab results were rejected at a 2013 Massachusetts Civil Service Commission hearing concerning Boston police officers. The appeal on that case is still pending. (Tr. 138, 142, 170, 175)

c. The Quest Results of Respondent's 3rd NYPD Hair Sample

Lieutenant Kelly Milevoj, commanding officer of the Drug Screening Unit, testified that upon learning of Respondent's Psychemedics results, she took his third sample out of storage and moved it to a safe in the administrative office. On May 20, Respondent came to the Medical Division, where under Milevoj's observation he inspected the third sample's packaging and prepared the paperwork for shipment to Quest. The sample was kept in a locked filing cabinet at the sick desk until shipment occurred. (Tr. 191, 194-195, 197-198; Dep. Exs. 11, 12)

In a personal log maintained by Milevoj, she noted two concerns with the Quest results. On June 2, she noted in her log that the results were "unclear." Milevoj explained that there was a notation on the results stating, "GC/MS interference, result invalid." She did not know what that meant and contacted a scientist at Quest for

clarification. The scientist was able to resolve the matter. (Tr. 202-203, 210; Resp. Ex.

B)

On July 9, Milevoj noted in her log that the “litigation package and Quest result needed to be revised to read correct donor name.” She explained that the lab had transmitted Respondent’s identification number incorrectly onto the results. She was informed that this error was the result of the lab scanning the wrong information after misreading the handwriting on a Department form. Because the external identification number in the corner of the results matched the custody and control form, however, there was no doubt that the test results were based on Respondent’s sample. (Tr. 203-204, 210-211; Resp. Ex. C)

According to a Quest laboratory data package, dated July 10, GC/MS analysis conducted on Respondent’s third sample came back with a reading of THC at a concentration of 44pg/10mg. Cairns explained that this result was not substantially different from the Psychomedics results when you consider that the two labs use different methods and technologies. (Tr. 111, 132, 144; Dep. Ex. 10)

d. The April 26 Urine Test

Respondent’s urine sample, collected just after he was notified of the hair test results, came back negative for marijuana metabolites. (Tr. 376; Resp. Ex. I) According to Cairns, typically a urine test will only show marijuana use within the last 72 hours. In cases of chronic marijuana use, however, evidence of the drug may still be found in urine a month after ingestion. (Tr. 92, 143)

e. Two Follow-Up Hair Tests

On June 7, Respondent went to Bagill's Testing in Brooklyn to provide a hair sample. This sample, which was collected from Respondent's head, was one centimeter in length. Cairns explained that because head hair grows at a rate of 1.3 centimeters per month, Respondent's sample had a look back period of approximately 21 days, going back to the middle of May. The sample, which was sent to Psychemedics for analysis, came back negative for all drugs. Cairns acknowledged that he made a clerical error on the result summary page by writing the wrong sample number in one location. He explained that the data on Respondent's sample was accurate; although he did not change the sample number on the template he used to prepare the summary page. (Tr. 161, 163, 173-174, 177-178, 379-380; Resp. Ex. A) When asked why he waited until June to conduct his own hair test, Respondent explained that he initially believed that his positive results were caused by a diet tea he had been drinking. He did not think of getting another hair sample tested until after the laboratory analysis debunked his tea theory. (Tr. 372-373, 393)

Respondent at one point also purchased a PDT-90 at-home hair testing kit at the drug store. He cut a hair sample himself and mailed it to the laboratory. The sample came back with negative results. He received the results over the phone. The laboratory did not provide any documentation. He later learned that the testing kit was marketed by Psychemedics. According to Cairns, at-home testing kits have no chain of custody or forensic value. (Tr. 135, 377-379)

f. The August Nail Tests

Respondent also had drug screening conducted on fingernail and toenail samples. Phyllis Prekopa is the president of Drug Check Consulting, a drug testing and consulting company. On August 9, she collected Respondent's fingernail sample. On August 17, she collected the toenail sample. The sample collection process entailed Respondent cutting his own nails under Prekopa's observation. Prekopa instructs clients to cut samples at least a quarter of an inch long. There is no indication, however, of sample length or weight in the resulting data packages. Prekopa secured the samples in containers and shipped them to United States Drug Testing Laboratories (USDTL) for analysis. Both of Respondent's samples came back with negative results for all drugs. (Tr. 234-239, 241-242, 244-245, 249; Resp. Exs. G, H)

When asked why he waited until August to have testing conducted on his nails, Respondent explained that he did not even know that there was such a thing as nail testing until his attorney informed him. After that, it was just a matter of days before he submitted his fingernail sample. He intentionally waited a few days to give a toenail sample because he knew toenails have a longer look back period. (Tr. 392-393)

Joseph Jones is vice president of laboratory operations at USDTL, which specializes in detecting drug markers in specimen types such as nails. Based on the qualifications cited in his curriculum vitae, he was deemed an expert in the field of forensic toxicology. (Tr. 255; Resp. Ex. F)

Jones explained that, as in hair, drugs and their metabolites become trapped in nails as they grow. He further explained that for several reasons a nail tip clipping gives a representative history of a nail's entire trip across the nail bed. First, not only does

drug-contaminated blood get incorporated into the nail at its root, but blood from the capillary-rich nail bed feeds the nail as it grows. Second, the sweat and oil from the cuticle around the nail contain drug and drug metabolite, and these fluids bathe the nail and over time deposit the drug and metabolite into the nail. The third reason is environmental exposure, meaning that a person who handles drugs or is in an environment where drugs are being used will have the drug compound incorporated into the nail. The look back period for fingernails is typically six months, though it could be as short as four months. Toenails have a look back period of 12 to 14 months. About Respondent's nail samples, Jones testified that they arrived at the lab with their packaging and chain of custody materials intact and underwent EIA analysis. According to Jones, the negative results meant that there lacked evidence that Respondent was a user of marijuana during the six or twelve months prior to sample collection. USDTL did not conduct GC/MS analysis on Respondent's samples. (Tr. 261-268, 279-281)

Jones agreed that hair testing is a reliable method for the detection of THC in an individual's system, and he had no reason to doubt the accuracy of the Psychemedics and Quest results. He confirmed that the nail samples collected from Respondent in August had no bearing on the hair test results. In fact, USDTL's website states that a nail test cannot be used to prove that a previously taken hair test was inaccurate since "the result of any second collected specimen has absolutely no bearing on the validity of the result of any first collected specimen because you have no idea what the donor did between time A and time B." (Tr. 275, 277, 282-283; Dep. Ex.14)

USDTL does not have certification from the FDA, nor is it licensed by the New York State Department of Health specifically for the analysis of nails for THC. To

Jones' knowledge, no federal or New York State agency uses nail clippings to test its employees for marijuana use. Nail testing is, however, recognized as being reliable and accurate within the forensic community, and there are a handful of law enforcement agencies that use it. (Tr. 277-278, 281-282, 286-287)

On rebuttal, Cairns testified that nail tests are not a reliable form of workplace drug testing, as they have not passed FDA scrutiny. The drug tests that the Department relies on have both FDA clearance and New York State certification. According to Cairns, fingernails grow at a rate of 3.5 millimeters a month, and the average fingernail is about 12 millimeters long. This means it takes a fingernail three to five months to grow. Because a fingernail sample consists of just a few millimeters of nail cut from the tip, however, the look back period is actually a window of just a few weeks that occurred three to five months earlier. Similarly, a toenail sample has a look back period of just a few weeks from about a year earlier. According to Cairns, Jones' statement that a nail tip clipping gives a representative history of a nail's entire trip across the nail bed is a "gross misinterpretation." Cairns explained that while blood at the root does get incorporated into the nail, any subsequent exposure to drug-contaminated fluid is akin to environmental contamination, meaning it would get washed off the sample prior to laboratory analysis. Research has concluded that nail clippings provide just a "snapshot" of an event that took place months earlier. Hair samples of specified lengths that are cut from the head, in contrast, provide a continuous time window to analyze. (Tr. 314-316, 318-319, 322, 327, 346)

About Jones' statement that there lacked evidence that Respondent was a user of marijuana during the six or twelve months prior to sample collection, Cairns explained

that this was inaccurate not just because the look back period for nail samples is on average shorter. It was inaccurate also because the test conducted by USDTL did not look for drug concentrations below the cutoff level. Moreover, because USDTL did not conduct GC/MS on Respondent's samples, there was no test specifically for THC. All that the lab's EIA analysis tested for was cannabinoids, the parent drug compound. According to Cairns, using GC/MS to test for THC without regard for cutoff would be the only way to unambiguously prove that there was no ingestion. (Tr. 321, 324, 327-328)

On surrebuttal, Jones disagreed with Cairns' testimony. First, according to Jones, EIA analysis picks up THC in addition to the parent drug. (The tribunal notes that the USDTL data package results are not specific to THC concentration.) Second, peer-reviewed scientific journal articles support the premise that nails record drug exposure throughout their growth and thereby provide a significant look back period, not just the short "snapshot of exposure" as claimed by Cairns. Jones cited one specific journal article: "Drugs in Nails Physiology, Pharmacokinetics, and Forensic Toxicology," published in February 2000 in *The Journal of Clinical Pharmacokinetics*. Third, as of January 2015, the nail testing procedure used at USDTL has been approved by the State of New York. USDTL has not obtained FDA approval. Jones explained that FDA approval is required for workplace testing, and USDTL does not necessitate this approval because it does not market itself as a workplace drug testing laboratory. (Tr. 331-332, 334-335, 340-341, 350)

g. Respondent's Character

Respondent testified that he has never consumed marijuana, nor has he possessed marijuana outside of his police duties. When asked why this tribunal should believe him, he replied, "I am in my nineteenth-and-a-half year. My parents never condoned [marijuana] . . . and it was never anything I had an interest of taking or doing. And I would definitely not do this now at this point in time in my life." (Tr. 382)

Police Officer Brenda Winn, a 20-year member of the Department who has worked with Respondent for 18-and-a-half years, testified that she did not believe the allegations against him. In 2013 and early 2014, she was regularly a passenger in a Department van driven by Respondent. She also socialized with Respondent and knew his family. She never smelled marijuana on Respondent's clothes or observed Respondent exhibit signs of marijuana use. (Tr. 294-295, 297)

FINDINGS AND ANALYSIS

Respondent is charged with possessing and ingesting marijuana without police necessity or authority after a random drug test revealed the presence of the cannabinoid metabolite carboxy THC in a hair sample collected by the department as part of a random drug test. Respondent defended against these charges by categorically denying that he has ever used marijuana and arguing that the Department's test results are wrong. After evaluating the testimony and evidence presented at the hearing, and assessing the credibility of the witnesses, this tribunal finds that the preponderance of the credible evidence established that Respondent engaged in the charged misconduct.

Respondent's attempt to challenge the Department's collection procedure was unpersuasive. For example, although Respondent recalled cutting the hair samples from

his pubic region with a scissor, instead of a razor, there was no credible evidence presented that this affected in any way the integrity of the lab results. Presumably most samples collected from the head are cut with scissors and undergo laboratory analysis unchallenged. Likewise, that Respondent did not recall Morrissey wiping down the table or covering it with paper does not prove that Morrissey did not take those measures. Morrissey worked at the Drug Screening Unit for nearly a year and a half, and the Court was given no reason to doubt his testimony that he routinely follows these basic preliminary steps as part of his standard collection procedure. Even respondent's most troubling claim did not meet the evidentiary standard. At trial Respondent argued that there was a fatal procedural irregularity in the collection procedure because Morrissey did not seal the hair samples in front of him. While we can never know with certainty exactly what occurred inside the collecting room that day, we do know that Respondent initialed the interior and exterior packaging for each of his sealed samples and signed custody and control forms certifying that the sealed samples were his and that he had "witnessed the sample collector seal the sample in the envelope." Had Respondent been uncomfortable with the collection procedure, he could have refused to initial and sign his samples and brought his concerns to a supervisor's attention. (Dept. Ex. 3) In sum, Respondent's testimony did not convince this tribunal that the Department strayed from standard collection procedures in any manner that undermined the integrity of the samples, the testing or the results. Similarly, this tribunal rejects as merely speculative Respondent's vague claims concerning the technician's qualifications and that the Drug Screening Unit's caseload might have compromised the chain of custody of his hair samples.

This tribunal further finds that the Department amply proved that Respondent's hair samples were accurately tested using a New York State licensed and FDA approved laboratory. Cairns' testimony credibly established that Respondent's hair samples contained carboxy THC at a concentration of more than 25 times the administrative cutoff level -- a result that rules out passive or involuntary exposure or ingestion of marijuana.

Respondent also attempted to challenge the results by raising doubts about the Psychmedics test based primarily on two errors in the Laboratory Data Package: the omission from the results page that the samples were collected from the pubic region and Cairns mistakenly transcribing a number on his executive summary page. (Dept. Ex. 9) Cairns, however, convincingly explained that these errors were merely clerical in nature and that they were both caught and corrected. Furthermore, Respondent presented no credible evidence that his Psychmedics test results were prejudiced by this or any other technical or procedural irregularities. Accordingly, based on the testimony summarized above, this tribunal finds that the preponderance of the credible evidence established the reliability of the Psychmedics results.¹ *See Matter of Brinson v. Safir*, 255 A.D.2d 247 (1st Dept. 1998) (neither mistake in transcription of subject identification number, nor placement of test tubes in centrifuge leading to re-test, affected accuracy of test results, and there was "otherwise no basis in the record to disturb [the] determination regarding the accuracy of the tests performed").

¹ In reaching its findings, this tribunal has not taken into account the positive hair test results issued by Quest after analyzing the third hair sample collected from Respondent by the NYPD. In contrast to the errors noted in the Psychmedics data package, the Quest errors are troubling. Milevoj's testimony about an "unclear" and "invalid" result naturally raises concern. While a scientist satisfactorily resolved the matter in Milevoj's mind, nobody from Quest appeared at trial to flesh out exactly what these notations referred to and whether the problems were addressed. There was also testimony regarding the possible mislabeling of Respondent's sample. It is unclear whether this mislabeling involved the incorrect donor name or identification number. In either case, without a clearer and more comprehensive explanation of exactly what did or did not go wrong with Respondent's sample the tribunal cannot conclude that the Quest testing was reliable in this case.

Respondent also attempted to challenge the validity of the Department Psychmedics test results by introducing a series of additional drug tests that tested negative for the presence of marijuana or related metabolites. Respondent's supplemental tests included urine tests, additional hair tests and fingernail and toenail tests. Each of these is reviewed below.

Respondent first asks this tribunal to infer that the Psychmedics hair test is unreliable because the urine test, administered as soon as he learned of the Psychmedics results, tested negative for drugs. This argument ignores the fact that the two tests have different look back periods. Urine tests are clearly best for capturing very recent drug use. It is likely that Respondent would pass a urine test so long as he stayed away from marijuana in the days immediately preceding sample collection. The April 26 urine test results were, therefore, not per se inconsistent with the April 14 hair test results.

Respondent had two additional hair samples tested for marijuana, both of which came back with negative results. These hair results, however, must also be discounted. I credited Cairns' testimony that given the timing and length of the hair samples submitted to the lab, the April 14 Department hair test and Respondent's June 7 hair test have different look back periods. This means that Respondent could have ingested marijuana regularly between January and April 2014 and still have tested negative in June so long as he stayed away from marijuana for the three weeks prior to sample collection. Furthermore, Respondent's PDT-90 at-home hair test has no forensic value because there was no established chain of custody or written laboratory data package certifying results. In sum, neither test can be credibly used to discredit the results of the official Department hair test.

Respondent also submitted fingernail and toenail tests which came back with negative results for all drugs. There is insufficient evidence in the record to find that Respondent's nail test results negate the positive Psychomedics results. First, it is important to note that the website for the laboratory used by Respondent, includes a clear disclaimer that its nail tests cannot be used to prove that a previously taken hair sample was inaccurate since "the result of any second collected specimen has absolutely no bearing on the validity of the result of any first collected specimen because you have no idea what the donor did between time A and time B." (Dept. Ex. 14) At trial, Respondent's expert, Jones, confirmed that the nail samples collected from Respondent in August had no bearing on the hair test results. He also agreed that hair testing is a reliable method for the detection of THC in an individual's system, and he had no reason to doubt the accuracy of the Psychomedics results.

Second, unlike Psychomedics, USDTL does not have FDA clearance, and at the time of Respondent's tests, lacked certification from the New York State Department of Health. The Department, however, only uses labs that have received approval from both of these licensing bodies.

Third, this tribunal was unpersuaded that the look back period for the nail samples were consistent with those for the Department hair samples. According to Jones, fingernails have a look back period of four to six months. Cairns countered that the look back period is a month shorter. In either case, it is quite possible that the hair sample collected on April 14 and the fingernail sample collected on August 9 had different look back periods. In other words, Respondent could have ingested marijuana in the first

quarter of 2014 and, so long as he quit by April or early May, still get negative results on the August fingernail test.

The toenail test results present different evidentiary issues. Because toenails have a look back period of 12 to 14 months, the August 17 toenail test was the only follow-up test with a look back period that overlapped with the April 14 hair samples. For this reason, it is the test that most strongly challenges the legitimacy of the Psychomedics results. This challenge, however, failed. The nature of the nail look back period seems to be a point of contention within the scientific community. Based on the back-and-forth between the two expert witnesses, it is clear that our understanding of how nails grow is still unsettled. Are, as Jones testified, drug-contaminated blood and fluids continuously incorporated into nails as they grow? Or, as Cairns testified, does incorporation occur just at the root? Even the article cited by Jones concludes that “the potential of drug monitoring in nails still lacks harmonization and validation of analytical methodologies and a better comprehension of the possible correlation between drug concentrations in the matrix and period of exposure.”² Without a definitive answer to these questions, the Court cannot know if a nail tip clipping provides a continuous and substantial look back period, or if it provides just a brief snapshot of the past. Accordingly, this tribunal cannot accord the toenail test results significant probative weight.

This tribunal has considered and rejected all other arguments raised by Respondent.³ In making this finding I note that there is no allegation that Respondent acted as if he were under the influence of marijuana while on duty. It is impossible for

² Clinical Pharmacokinetics (Feb. 2000), *Drugs in Nails: Physiology, Pharmacokinetics and Forensic Toxicology*, Palmeri, A., Pichini, I., Pacifici, R., Zuccaro, P., Lopez, A.,

³ Respondent's counsel noted that the Massachusetts Civil Service Commission has rejected certain Psychmedics lab results. There is no evidence, however, linking those facts to the details of the case at hand. For example, the Massachusetts decision addresses the testing for cocaine and not marijuana. In any event, that case is still on appeal.

anyone to know what a colleague does behind closed doors after work. This is the very reason the Department administers random drug tests. Without proof countering the convincing evidence supporting the reliability of the Psychomedics results, those results stand. *See Matter of McBride v. Kelly*, 215 A.D.2d 161 (1st Dept. 1995) (substantial evidence that officer ingested cocaine was provided by immunoassay and mass spectrometry). Accordingly, the Court is left with no other choice but to find Respondent guilty of the subject charges.

PENALTY

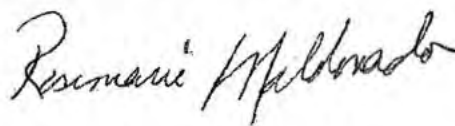
In order to determine an appropriate penalty, Respondent's service record was examined. *See Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 240 (1974).

Respondent was appointed to the Department on June 30, 1995. Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

Respondent has been found Guilty of possessing and ingesting marijuana without police necessity or authority. The Department has a strong interest in not employing persons who ingest and possess illegal drugs like marijuana. Accordingly, the Court recommends that the Respondent be DISMISSED from the New York City Police Department. *See Disciplinary Case No. 85554/09*, signed January 5, 2011 (16-year member with no prior disciplinary record is dismissed from the Department for possessing and ingesting marijuana. Court rejected Respondent's argument that he may have used marijuana during alcohol-induced blackouts), *See Disciplinary Case No. 81455/05*, signed August 3, 2007 (23-year member was terminated from the Department for possessing and ingesting marijuana), confirmed sub nom. *Matter of Chiofalo v. Kelly*,

70 A.D.3d 423 (1st Dept. 2010); *but see Matter of McDougall v. Scoppetta*, 76 A.D.3d 338, 905 N.Y.S.2d 262 (2d Dept. 2010).

Respectfully submitted,



Rosemarie Maldonado
Deputy Commissioner Trials

APPROVED

APR 02 2019

WILLIAM J. BRATTON
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER KEITH SAWYER
TAX REGISTRY NO. 916647
DISCIPLINARY CASE NO. 2014-11720

Respondent received an overall rating of 3.5 "Highly Competent/Competent" on his last three annual performance evaluations. He has been awarded one medal for Excellent Police Duty. [REDACTED]

[REDACTED] He has been suspended from duty since April 25, 2014. He has no prior formal disciplinary record.

For your consideration.



Rosemarie Maldonado
Deputy Commissioner Trials